relevant, including a free cash flow showing as advocated by Falcon, supra. In particular, a cable operator showing that it is not making a reasonable profit per se must be found not to be charging unreasonable rates. A contrary result would clearly be confiscatory.[113]

Indeed, the Commission should also establish that in cases where a cable operator's rate is above the maximum allowed by the benchmark formula, the cable operator should have the discretion to add additional cable programming services to its channel line up as an alternative to reducing its rate. Such an approach would be entirely consistent with the Congressional policy to enhance the diversity of programming and would prevent rate regulation from providing regulatory obstacles to the accomplishment of this goal.[114] Moreover, we urge the Commission to recognize the serious administrative burdens associated with accounting for refunds of rates found to be unreasonable and distributing such refunds to subscribers as of the date when the complaint was filed, many of whom may no longer be subscribers or even residents of the community. Accordingly, we concur that a prospective percentage reduction in future rates would be easier to implement in situations where the operator elects a refund rather than an increase in service.[115]

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[113] See e.g., Matson Navigation Co. v. Federal Maritime Comm'n, supra.

[114] See §2(b) of the 1992 Cable Act.

[115] NPRM at ¶108.

IV. GENERALLY APPLICABLE PROVISIONS

A. Geographically Uniform Rates and Discrimination

Section 623(d) of the 1992 Cable Act mandates that a rate-regulated cable operator's rate structure be uniform throughout the "geographic area" served by the cable system. This section should be considered as complementary to the 1984 Cable Act provision which requires franchising authorities to assure that access to cable service is not denied to any group of potential subscribers because of their income.[116] Thus, Section 621(a)(3) prevents the cable operator from "redlining", i.e., not serving, unattractive neighborhoods; and Section 623(d) prevents the rate-regulated cable operator from discriminating between neighborhoods on the basis of price. This provision also must be construed in light of Section 623(e) of the 1992 Cable Act, which permits -- but does not require -- state, local and federal authorities to issue regulations "prohibiting discrimination among subscribers and potential subscribers to cable service." Because Section 623(e) specifically identifies certain classes of subscribers, (e.g. senior citizens, hearing-impaired persons), it is clear that Section 623(d) is intended to regulate only geographically-based price differences.

1. Geographic price uniformity requirements for cable systems serving more than one franchised territory should be mitigated.

It is not uncommon for a single technically-integrated cable system to serve more than one franchised territory.

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[116] 47 U.S.C. §541 (a)(3).

Nevertheless, the franchises are not necessarily uniform. Franchise-imposed requirements can have a dramatic effect on the cost of system operation. These costs can be both direct and indirect. Direct costs would be those costs that may be passed through and separately itemized on the customer's bill pursuant to existing law, e.g., the franchise fee amount, PEG channel expenses, and any other fee or tax imposed by the government on the transaction. As is more fully set forth elsewhere in these comments, differences in these costs between franchised territories served by a common system will not place the cable operator in jeopardy under Section 623(d).

A franchising authority also has the ability, through franchise requirements, to impose significant indirect costs on a cable operator. For example, a franchising authority can require the cable operator to build all of its plant underground, or, in enforcing customer service requirements pursuant to Section 632(a)(1), it might require a local office or set the hours that the office is open or the speed with which customer telephone calls are answered.

If a cable operator uses a single system to serve more than one franchised area and a particular franchise community imposes higher costs than another on the cable operator, there is no public purpose in prohibiting the operator from charging a higher price to subscribers in the community that receives those additional benefits.

There are two additional limitations on mandated geographic rate uniformity that need to be mentioned. First, to the extent that the price a cable operator charges in a particular community is mandated by that community through exercise of its rate regulatory authority, the cable operator should not be required to adhere to that same price in other franchised territories served by the same system. While the Act does not prevent communities served by the same cable system from exercising their rate regulatory authority collectively, it is not intended to permit rate regulation in one community to have extraterritorial effects. Second, if a cable operator in one of the communities served by a technically-integrated system is subject to effective competition and therefore is not subject to rate regulation, the rates charged in that community should not be used as a benchmark against which rates in other communities served by the same technically-integrated system are measured for establishing compliance with Section 623(d). In either of these circumstances, there is no indication that the intent of Congress was that a special situation in one community should dictate cable rates in other communities served by the same system.

2. <u>Geographic uniformity should not be applied to individually-negotiated contracts with multiple dwelling units</u>.

Cable operators often sell their service to institutional customers, such as apartment owners, hospitals, hotels, trailer parks and condominium associations on the basis of an individually-negotiated contract. In some of these circumstances, the cable operator provides service to a large number of outlets for a single institutional customer (such as an apartment building) in return for a fixed monthly payment from that customer. The payment does not vary during the life of the contract, or periodic variations are negotiated in the contract, and the duration of the contract is for a fixed period of years.

In other cases, the cable operator negotiates with an apartment owner, a condominium association, or a private community developer for the right to serve individual households living in that apartment building or planned community. In these circumstances, the owner, association or developer offers all multichannel service providers, including SMATV, MMDS and cable, the opportunity to negotiate for the exclusive right to offer service to households in the apartment buildings or private community but does not guarantee any particular number of subscribers and does not assume responsibility for paying the cable operator's bill. An element of these contracts is the multichannel service provider's agreement as to the rates it will charge households within the affected buildings or community. Thus, in this situation, the apartment owner, condominium association or homeowners' association uses its control of access to regulate rates.

Rate-regulated cable operators should not be required to offer the same price terms to every MDU that is a customer or potential customer located in the area served by the cable system. A geographic uniformity requirement applied to such contracts would effectively prevent the franchised cable operator from negotiating individually with MDUs. The operator would be forced to adopt a "take-it-or-leave-it" standard contract and contract price. The operator would not be able to adjust its price to reflect the particular characteristics of the MDU it was serving.[117] Moreover, this would hamper the cable operator's ability to compete for MDU business since SMATV and MMDS operators would only need to beat the cable operator's area-wide price to win the contract. Thus, imposition of geographic uniformity on the cable operator would bring about a result contrary to the overall intent of Congress.

In the competition for the right to serve MDUs, the cable operator almost always faces competition from SMATV operators and any MMDS operators which may be licensed to the community. Either of these delivery systems are reasonable substitutes for the franchised cable operator in delivering the same or substantially the same program channels to customers who reside in MDUs as is recognized by the definition of "multichannel video programming distributor" contained in the Act. The owners or managers of MDUs are sophisticated business entities who are fully capable of representing themselves competently in negotiations with the franchised cable operator. They have a choice of multichannel service providers, the value of the

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[117] Suppose, for example, that a cable operator contracted to supply basic cable service to a hospital with 200 patient rooms for $2,000 per month. However, as part of the transaction, the cable operator agreed to build an internal distribution system with a free channel and supply video surveillance cameras at the three entrances to provide security, all at no "additional" charge to the hospital. If the cable operator already had agreed to supply a 200-unit hotel with basic cable service to each room for $1,500 per month, it might be considered in violation of §623 (d), even though providing service to the 200-room hospital is more expensive than providing service to the hotel.

contract is high enough to merit their attention and effort, and they are experienced in negotiating with various vendors of services for their facilities. In short, this group of customers is not in need of any special legal protection.

Finally, if the Commission adopts the suggestion made elsewhere in these comments that "effective competition" be determined separately for MDUs and for individual residential subscribers, a cable operator would be free to negotiate individually with each MDU if multichannel competitors were serving significant numbers of MDU customers. However, for the same reasons that unregulated rates in a franchise territory subject to effective competition should not be used as a benchmark for rates in other franchise territories served by the same cable system, so individual per-unit rates in an individually-negotiated MDU contract should not be a benchmark for per-household rates for non-MDU customers served by the same system.

3. <u>A cable operator serving an entire community should be permitted to meet the price of a cable competitor</u>.

A requirement of geographic price uniformity can be economically crippling to a cable operator that is partially overbuilt by another cable operator or that faces geographically-limited competition from another multichannel provider, especially if the second operator does not face other governmentally-imposed costs, such as franchise fees, PEG costs, institutional loops and the like. Typically, the competitor begins in the most attractive portion of the franchise territory.

If the competitor does not serve the entire community or is otherwise free of certain governmentally-imposed costs borne by the community-wide operator, the competitor's lower costs can allow it to underprice the community-wide operator and still make a profit. If forced to have a geographically uniform price, the operator must choose between maintaining its price and losing significant numbers of its customers in the overbuilt area, or lowering its price system-wide and losing significant total revenues. If the operator elects the latter course, it may be pricing below cost system-wide, an action which, if continued, will threaten the system's financial viability. While consumers in the non-overbuilt area might benefit in the short-run from lower prices, that benefit will be short-lived if the cable operator serving their neighborhood goes out of business as a result of being prevented from meeting its competitor's price on a geographically-selective basis.

To the extent that Section 623(d) is implemented to require geographically uniform pricing, it indirectly regulates competition between cable operators that have partially overbuilt each other or between a cable operator and any other multichannel video programming distributor that elects not to compete with the cable operator system-wide. Falcon submits that in those few circumstances in which a community-wide cable operator is overbuilt by a cable operator or other multichannel provider who does not serve the entire community or who otherwise experiences lower governmentally-imposed costs, the community-wide cable operator ought to have the ability to selectively meet the competitor's price.

This ability to meet the competitive price in the overbuilt area would confer a long-term benefit on consumers in two ways: first, it would make it more likely that there would be vigorous price competition in the overbuilt area; and, second, it would make it less likely that the community-wide cable operator would be placed in financial jeopardy by a competitor that elected to contest only the prime neighborhoods among all those served by a single cable system.

Finally, while most promotional rates are offered system-wide, it has long been industry practice to offer special promotional rates or other incentives to customers or potential customers living in a neighborhood that has just been wired for cable television or whose cable television plant has just been rebuilt and upgraded by the cable operator. Usually these promotions are either free or reduced-rate initial installation charges or are discounted service charges for the first month. Because these promotions are of short duration and reflect a cable operator's entry into a neighborhood (or expansion of service offerings in the same neighborhood), their unavailability system-wide has virtually no effect on overall consumer welfare and should be viewed as a benign effort to promote cable service to a new group of customers. The Commission should therefore exempt from geographic uniformity requirements promotions of no more than six months' duration offered in areas newly served by cable or newly rebuilt and upgraded.[118] Moreover, promotional rates in existence on the effective date of the new rules should be grandfathered.

4. The Discrimination Provision is Specific in its Focus.

Reflecting the current practice of some cable operators to grant a "senior citizen discount," the Congress has specifically protected such customer-based rate discrimination in Section 623(e). It also has specifically authorized a franchising authority to require the cable operator to supply equipment to hearing-impaired customers and to regulate the price charged for such equipment. Beyond that, Section 623(e) simply clarifies Congressional intent that the 1992 Cable Act does not prohibit franchising authorities from adopting other kinds of non-discrimination regulation. Thus, this section should not be read as constituting a Congressional blessing of any comprehensive effort to regulate a cable operator's rate categories.

While franchising authorities and other governmental bodies undoubtedly have the authority to prohibit discrimination on the basis of race, religion, sex, or national origin, there is no indication in the legislative history of a Congressional intent to go beyond these traditional prohibitions of discrimination. Nor is there any legislative finding of any such discrimination on the part of cable operators. Therefore, Falcon believes the

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[118]And, of course, promotional rates for premium services should not be a subject for uniformity concerns since premium rates themselves are not subject to regulation under the 1992 Cable Act.

correct application of this provision is only to protect "senior citizen" rates and other special rates for economically disadvantaged groups and to provide for the possibility of mandated furnishing of equipment to assist hearing-impaired cable customers at regulated rates. On the other hand, franchising authorities must not be allowed to prohibit business-justified differential rates for various classes of subscribers which do not incorporate any such "suspect" types of discrimination.

B. The Negative Option Prohibition is Limited

Section 623(f) of the 1992 Cable Act provides that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."[119] This provision was added to the 1992 Cable Act largely as a result of the marketing by a major cable operator of the Encore programming service, in which subscribers were provided with Encore, a new service not previously offered on any of the subscribers' existing tiers. Subscribers were immediately billed for this new service unless and until they called the cable system to cancel it.[120]

The Encore experience demonstrates the limits of the 1992 Cable Act's negative option provision. Specifically, a negative option should be deemed to occur only where subscribers are provided with and billed for a new service or program package consisting of services to which they did not already subscribe

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[119] 47 U.S.C. §543(f).

[120] See 138 Cong. Rec. S14248 (Sept. 21, 1992) (statement of Sen. Gorton).

without the subscriber's affirmative request to do so (either orally or in writing). This test would fully encompass the Encore situation as a negative option, as Congress intended. In all other instances, the rearrangement of services would be subject to either the 1992 Cable Act's basic rate regulation provisions (if the change occurred on the basic service level and the cable system was not subject to effective competition),[121] the cable programming service rate regulation provisions (if the services in question are cable programming services),[122] or even a claim under the 1992 Cable Act's anti-evasion provisions on the basis of an imputed rate increase (e.g., less service for the same rate).[123]

The legislative history of the negative option prohibition makes clear that "[t]his provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service."[124] Unless "negative option" is properly defined in this fashion, Congress' intent to allow "changes in the programming mix," which the Commission agrees is permitted, as well as cable operators' right to retier, would be jeopardized. For example, it is quite common and quite conceivable that a programming change would involve the addition (or substitution) of programming on an existing tier, and there

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[121]47 U.S.C. §543(b).

[122]Id. at §543(c).

[123]Id. at §543(h).

[124]Conference Report at 65; see also NPRM at ¶118.

is no evidence that Congress intended to foreclose this type of change. Moreover, requiring cable operators to remarket to every subscriber the reconfigured service following each programming change, including the addition or deletion of programming services, would be unduly burdensome upon cable operators, and would severely hinder the 1992 Cable Act's goal of "ensur[ing] that cable operators continue to expand, where economically justified, their capacity and the programs over their cable systems."[125]

Accordingly, the Commission should not define "negative option" as broadly as suggested, for example, by the Wisconsin Department of Justice, which has proposed to require downgrading and remarketing of customers upon launching a lifeline basic tier. Wisconsin's proposal would, among other things, require cable operators to notify each customer of "the elimination of a program channel or other item within" a cable service.[126] Thus, Wisconsin's proposal would essentially outlaw all retiering, a result that would flagrantly violate a fundamental cable operator right.[127]This type of practice is a typical programming change that Congress has specifically permitted, and prohibiting or subjecting it to extensive remarketing requirements would be

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[125]1992 Cable Act, §2(b)(3).

[126]Special Order -- Billing for Unordered Cable Services (proposed), Wisconsin Department of Justice.

[127]See In re Community Cable, 95 FCC 2d 1204 (1983), recon. den., 98 FCC 2d 1180 (1984). Moreover, as the NPRM recognizes, Congress has not only upheld this right, it has even required retiering in certain cases. See NPRM at ¶127.

unduly burdensome. There would be little value to a cable operator's right to retier, which is unquestionable under the 1992 Cable Act, if any such tiering or deletion would be viewed as a prohibited negative option unless the service was remarketed to each subscriber of the tier. This would effectively eliminate the right to add or delete services because of the potential marketing cost and delay in implementing service.

Falcon agrees, therefore, with the NPRM's tentative conclusion that "a change in the composition of a tier that was accompanied by a price increase justified under our rate regulations would not be subject to the negative option billing prohibition."[128] We also agree with the NPRM that the negative option provision does not "apply to system-wide upgrades in equipment accompanied by a justified price increase."[129] However, this definition cannot logically be limited to "justified" price increases. Price increases, justified or not, have no logical nexus with negative options. The statute and legislative history make clear that it is the introduction and unauthorized extra billing of a new service, not the particular price charged, that triggers the negative option prohibition. If the price increase is "unjustified," the 1992 Cable Act establishes specific procedures to rectify such problems directly.

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[128]NPRM at ¶120.

[129]Id.

Accordingly, the Commission should clarify that the following practices are <u>not</u> negative options:

(1) Adding services to a subscriber's existing basic or non-basic service and simultaneously raising the price. This is a rate increase that may be subject to FCC standards, but not a negative option.[130]

(2) Deleting services from an existing basic or non-basic service without an appropriate rate reduction. This might be an implicit rate increase covered by the evasion section, but not a negative option.

(3) Dividing a subscriber's existing single service tier into multiple offerings and raising the total price. Again, this is a rate increase which may be subject to FCC standards but not a negative option. The subscribers have been given the <u>positive</u> option not previously available to select only a portion of the prior offering.

(4) Dividing a subscriber's existing single service tier into multiple offerings at the same net price. This is not even a rate increase.

In sum, a negative option only occurs when a subscriber is delivered, and billed for, an entirely new service or package of services which were not previously part of the services delivered to that subscriber, and which the subscriber has not affirmatively requested by name.

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[130] <u>See</u>, <u>e.g.</u>, 47 U.S.C. §543(b)(7)(B) ("[a] cable operator may add additional video programming signals or services to the basic service tier").

C. Prevention of Evasions

Section 623(h) of the 1992 Cable Act requires the Commission to "establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this [rate regulation] section."[131] The term "evasion" is ripe with negative connotations -- it implies that the cable operator is violating the letter and the spirit of the 1992 Cable Act. Accordingly, the Commission must take care in defining what constitutes an evasion.

First, it is clear that retiering per se is not an evasion under the 1992 Cable Act. Rather, the statute is intended to prohibit "evasions that result from retiering."[132] If retiering itself were automatically an evasion, the "result from" language in Section 623(h) would be superfluous. The cable operator's right to retier remains unfettered even if inconsistent with local franchise requirements, since this long-established right[133] has been reaffirmed by the 1992 Cable Act. Indeed, because of the new statutory definition of minimum basic service,[134] which the NPRM recognizes may require retiering,[135]

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[131] 47 U.S.C. §543(h).

[132] Id.

[133] See In re Community Cable TV, Inc., supra.

[134] 47 U.S.C. §543(b)(7).

[135] NPRM at ¶127.

the cable operator's right to retier has been bolstered by the 1992 Cable Act.[136]

The Conference Report recognized "that many cable operators have shifted cable programming out of the basic tier into other packages and that this practice can cause subscribers' rates for cable service to increase."[137] The Commission also recognizes this distinction in the NPRM.[138]

Accordingly, a reading of the statute, its legislative history, and the NPRM confirms that "evasion" is not intended to proscribe conduct which would be consistent with the 1992 Cable Act's rate regulation provisions. Rather, evasions should be limited to conduct which results in an implicit rate increase associated with tiering services, splitting tiers, or other actions that result in less service (i.e., fewer channels) to the subscriber without an appropriate adjustment in price. Therefore, the Commission correctly has determined that "[r]etiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change that complied with our rate regulations would not be deemed an evasion."[139] We agree with this proposal except

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[136]See also Conference report at 65 (specifically allowing "changes in the mix of programming services that are included in various tiers of cable service").

[137]Id. (emphasis added).

[138]NPRM at ¶127.

[139]Id.

possibly for the statement requiring that retiering not change the ultimate price <u>for the same mix of channels</u>. If "mix" of channels means the same <u>number</u> of channels, there is no objection to such an approach. Thus, we assume that dropping a broadcast signal from basic service because retransmission consent could not be obtained, and substituting another broadcast or cable service in its place, constitutes the same mix of channels. Any other interpretation would necessarily involve the Commission in making value judgments regarding the <u>content</u> of channels, an area that the Commission is neither permitted nor equipped to enter.

For example, if a cable operator removes two channels from a tier and retains the same price, an evasion may have occurred. The result of such an evasion would be that an implicit rate increase has been imposed as to that tier, and such rate increase would be subject to scrutiny pursuant to the applicable rate review procedures ultimately adopted by the Commission. However, if the cable operator removes two channels from a tier and replaces them with two different channels, while not changing the ultimate price, the Commission is in no position to rule that an evasion has occurred because the new channels are somehow less "valuable" than the channels that were removed. As Congress has determined, "changes in the mix of programming services that are included in various tiers of cable service" should be left to the cable operator's discretion.[140]

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[140]<u>See</u> Conference Report at 65.

In sum, the concept of evasions is in no way meant to foreclose a cable operator's right to tier or rearrange services. Rather, as the Commission apparently recognizes, the prohibition against evasions is meant to target the appropriate rate for the reconfigured service tier that now contains a smaller level of services. However, any judgments by the Commission regarding a cable operator's programming mix in this situation, where the level of service remains the same, improperly involves the Commission (or local authorities) in content judgment, in violation of the concepts contained in both the 1984 Cable Act and the 1992 Cable Act.

D. Small System Relief Suggestions

Section 623(i) of the Act directs the Commission to devise and implement regulations "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[141] As the Commission correctly notes in the NPRM, the plain language of the statute makes no distinction "between independently owned stand-alone systems of under 1,000 subscribers and systems of under 1,000 subscribers which are owned by a large" multiple system operator ("MSO").[142]

What the Commission fails to note in considering the manner in which a "small system" is to be determined is that rate regulation itself, under Section 623 of the Act, is administered not on the basis of a single integrated headend, each of which

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[141]47 U.S.C. §543(i).

[142]NPRM at ¶133.

could be comprised of numerous individual franchises, but on the narrower basis of a single cable franchise. Accordingly, the Commission must be careful not to disassociate the burdens and cost that go hand-in-hand with rate regulation from the basis upon which those burdens and costs are imposed. Unless the small system exemption is applied on a franchise basis, rather than a system basis, the burdens and costs of rate regulation on cable operators and franchising authorities alike will not be accurately reflected. For example, there are many systems with well over 1,000 subscribers which are spread across several franchised communities, many or all of which contain fewer than 1,000 subscribers. Under a system based test, such a system would not be eligible for small system relief, and thus would be subject to the same regulatory burden as its larger brethren, often in many more communities.

Furthermore, any measurement of subscribers on a system basis will discourage technological innovation associated with fiber optic interconnection of franchise areas. For instance, should a cable system comprised of three headends, each headend serving several franchise communities with an aggregate of under 1,000 subscribers per headend, desire to consolidate those separate headends into one and interconnect the franchise areas in the consolidated headend via fiber optic lines, measurement on a system basis for purposes of the small system exemption would act as a disincentive to such an upgrade of plant. Although still serving numerous separate franchise areas with under 1,000 subscribers each, the cable system as a whole would be providing service to more than 1,000 subscribers and would, therefore, lose the benefit of the exemption from certain rate regulatory burdens and costs that it enjoyed before consolidating into one headend. The resultant increase in regulatory costs and burdens associated with such a shift in regulatory status may be so great as to make the installation of fiber optic lines prohibitively expensive. Such would not be the case if the small system test were applied on a franchise basis, allowing operators to speed technological advances in program delivery to their subscribers.

There are other measurements that the Commission has used in the past or that are under present consideration with regard to defining what constitutes a small cable system for various FCC purposes. One such method of small system measurement is the density standard used in connection with the rural telco exemption and in the cable technical standards.[143] Based upon such a measurement, any cable system serving fewer than 30 homes per route mile should be considered small enough to qualify for relief from the administrative burdens associated with rate regulation. Alternatively, a measurement test that excluded from eligibility for small system relief any system serving a census designated place with a population of over 2,500 would serve the same purpose.[144] Each of these measurements is designed to foster an added competitiveness to systems laboring under the

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[143]See Telephone Co.-Cable Television Cross-Ownership Rules, 82 FCC 2d 233 (1979); and, Cable Television Technical and Operational Requirements, 7 FCC Rcd 2021 (1992).

[144]See 47 C.F.R. §§63.54 - 63.58.

constraints of serving smaller, rural areas. Considering the added expense of serving such areas of low population density, including the necessity of constructing extended amplifier cascades in a manner that will allow the FCC's new technical standards to be met while at the same time requiring the recoupment of such costs from a smaller subscriber base, such relief would be appropriate.

Among the various ways in which the Commission should seek to reduce the regulatory burdens on small cable systems, the simplest and most effective method would be to exempt small systems from basic rate regulation altogether. However, in order to provide some certainty that the Commission is not exempting cable systems truly large enough to enjoy some benefits resulting from economies of scale, the Commission could place a cap on the number of subscribers a cable system could have and still be eligible for small system relief. In that regard, a cap of 10,000 subscribers, as measured on a system basis, seems appropriate.

In addition, in order to provide adequate protection from unnecessary regulatory burdens for small cable systems, the following concepts should be incorporated into the Commission's final rate regulations: (1) separate benchmarks so that small system rates are compared to like systems; (2) a requirement that all communities with less than 1,000 subscribers served by the same small cable system file for joint certification by the Commission; (3) an additional cushion of 10 percent for each benchmark rate; and, (4) full relief from reporting requirements.

Any rate regulations not including these concepts stand a chance of opening up small cable systems nationwide to the potential for unnecessary, burdensome and costly regulation contrary to the intent of Congress.

E. Rate Agreements should be Grandfathered

The Commission seeks comment on the adoption of rules regarding the treatment of agreements between a franchising authority and a cable operator that provide for the regulation of basic cable service rates where there was no effective competition under governing Commission rules.[145] Although Section 623(j) of the 1992 Cable Act provides that such agreements are to be grandfathered if they were entered into prior to July 1, 1990, there is no rational basis for differential treatment of agreements concluded after that date. The 1992 Cable Act does not specifically address how franchising authorities operating under identical agreements entered into after July 1, 1990 are to make the transition to rate regulation under the Commission's new rules. The Commission, therefore, seeks comment on the treatment of these agreements as well.[146] Falcon urges that <u>any</u> rate regulation agreement of this type still in effect upon implementation of these rules, whether concluded before or after July 1, 1990, should be treated in the same manner -- all should be grandfathered. There is simply no

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[145]NPRM at ¶¶134-35.

[146]<u>Id.</u> at ¶135.

reason to treat valid pre-July 1, 1990 and valid post-July 1, 1990 rate regulation agreements differently.[147]

Any rules implementing Section 623(j) should apply only to basic cable service as defined by new Section 623(b)(7). Under this definition, cable operators are free to retier their cable programming. Any rates for non-basic tiers of "cable programming service" are then subject to exclusive Commission review pursuant to new Section 623(c).

Finally, any grandfathered basic rate agreements between a franchising authority and a cable operator must be enforceable by either party, regardless of whether the rate provided under such an agreement is greater or less than rates that might result under the Commission's new rate formula. The purpose of grandfathering existing basic rate agreements is to exempt such agreements from the rate regulation rules implemented pursuant to Section 623,[148] because those basic cable rates have already been regulated, via agreement, where the cable system that is a party to the agreement was not subject to effective competition under the Commission's regulations in effect when the agreement was concluded.

F. Collection of Information and Reports

The Commission seeks comment on the scope, availability and burden of providing the Commission with financial information

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[147]The legislative history is silent as to the treatment of post-July 1, 1990 rate regulation agreements. See House Report at 89 (section-by-section analysis of 1992 Cable Act addresses only pre-July 1, 1990 rate regulation agreements).

[148]See House Report at 89.

necessary for the effective administration and enforcement of rate regulation.[149] Cost data should not be included in the information collected because it will not be necessary for the administration and enforcement of the preferred type of rate regulation, which is not based on cost of service. Falcon advocates a rate comparison benchmark for the regulation of basic cable service rates, with a free cash flow alternative, thereby obviating the need for collection of burdensome cost of service information.

Rules implemented by the Commission in accordance with Section 623(g) should not require the collection of information beyond that requested on the forms sent to selected systems on December 23, 1992.[150] The information sought on those forms wisely pertains to revenue only, thereby avoiding competitively sensitive cost data which would trigger confidentiality concerns for the cable operator and the Commission. Furthermore, the plain language of Section 623(g) and the legislative history of that provision state that the Commission's rules should require only the collection of information that is absolutely necessary to administer and enforce rate regulation, and not extra, burdensome data, such as cost of service information.[151]

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[149]See NPRM at ¶¶122-24.

[150]See Order, MM Docket No. 92-266 (released December 23, 1992).

[151]See 47 U.S.C. 543(g) (cable operators must file with the Commission "such financial information as may be needed for purposes of administering and enforcing this [rate regulation] section"); House Report at 88 (cable operators must file

(continued...)